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State v. Thomas Respondent's Brief Dckt. 44695

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 44695
Plaintiff-Respondent,)	
)	Franklin County Case No.
v.)	CR-2015-110
)	
DAVID DANIEL THOMAS,)	
)	RESPONDENT'S BRIEF
Defendant-Appellant.)	
_____)	

Issue

Has Thomas failed to establish that the district court abused its discretion by imposing a unified sentence of six years, with two years fixed, upon his guilty plea to sexual abuse of a child under the age of 16 years?

Thomas Has Failed To Establish That The District Court Abused Its Sentencing Discretion

Thomas pled guilty to sexual abuse of a child under the age of 16 years and the district court imposed a unified sentence of six years, with two years fixed, and retained jurisdiction. (R., pp.97-100.) Following the period of retained jurisdiction, the district court relinquished jurisdiction. (R., pp.111-13.) Thomas filed a timely notice of appeal. (R., pp.116-18.)

Thomas asserts his sentence is excessive in light of his status as a first-time felon, work history, support from family and friends, purported remorse, and because his “thinking errors” “could be” addressed through treatment. (Appellant’s brief, pp.3-5.) The record supports the sentence imposed.

When evaluating whether a sentence is excessive, the court considers the entire length of the sentence under an abuse of discretion standard. State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2016); State v. Stevens, 146 Idaho 139, 148, 191 P.3d 217, 226 (2008). It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 687, 391 (2007). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. McIntosh, 160 Idaho at 8, 368 P.3d at 628 (citations omitted). To carry this burden the appellant must show the sentence is excessive under any reasonable view of the facts. Id. A sentence is reasonable if it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution. Id. The district court has the discretion to weigh those objectives and give them differing weights when deciding upon the sentence. Id. at 9, 368 P.3d at 629; State v. Moore, 131 Idaho 814, 825, 965 P.2d 174, 185 (1998) (court did not abuse its discretion in concluding that the objectives of punishment, deterrence and protection of society outweighed the need for rehabilitation). “In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ.” McIntosh, 160 Idaho at 8, 368 P.3d at 628 (quoting Stevens, 146 Idaho at 148-49, 191 P.3d at 226-27). Furthermore, “[a] sentence fixed within the limits prescribed by the statute will ordinarily not be considered an abuse of discretion by the trial court.” Id. (quoting State v. Nice, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982)).

The maximum prison sentence for sexual abuse of a child under the age of 16 years is 25 years. I.C. § 18-1506. The district court imposed a unified sentence of six years, with two years fixed, which falls well within the statutory guidelines. (R., pp.97-100.) Furthermore, Thomas' sentence is appropriate in light of his dishonesty and failure to accept full responsibility for his crime, his lack of amenability to treatment, and the resulting risk he poses to the community. Thomas denied that he had committed the instant offense when questioned by officers, and maintained his denial during his psychosexual evaluation, until he was found to be deceptive on his polygraph examination. (PSI, pp.22, 26, 31, 50-51.¹) He then admitted, during his post-test interview, to having committed some of the acts that resulted in the charges in this case, but was still found to be deceptive "on all test sequences." (PSI, pp.31, 46, 50-51.) During Thomas' subsequent presentence interview, he once again "adamantly denied" having committed the instant offense. (PSI, p.6.) Thomas' failure to accept full responsibility is concerning given that acceptance of responsibility is a prerequisite to successful rehabilitation. At sentencing, Thomas admitted only that he "spoke inappropriately" to the victim. (1/14/16 Tr., p.16, L.1.) Contrary to Thomas' claim that he is amenable to treatment, the psychosexual evaluator reported that, while Thomas "is capable of showing effort in treatment," Thomas did not believe he required sex offender treatment and "was not fully disclosing on testing." (PSI, p.44.) Consequently, the psychosexual evaluator determined that Thomas' "test results suggest he **may** potentially be a suitable treatment candidate," but only "[i]f he can be motivated for treatment." (PSI, p.44 (emphasis added).)

The presentence investigator concluded:

¹ PSI page numbers correspond with the page numbers of the electronic file "44695 Confidential Exhibits.pdf."

[Thomas] did not provide a truthful polygraph, and there is great concern as to what he may not be disclosing regarding his sexual history. Because we do not have a full understanding or honest report of his sexual behaviors, I do not feel he is a viable candidate for probation at this time. I believe that for the protection of society, until [Thomas] can provide a truthful polygraph he would benefit from a period of retained jurisdiction where he can begin the Sex Offender Treatment program.

PSI, p.23.) At sentencing, the state likewise argued that Thomas was not an appropriate candidate for probation, addressing Thomas' lack of candor, unwillingness to accept full responsibility for his criminal behavior, and the risk he presents to the community. (1/14/16 Tr., p.9, L.1 – p.11, L.22 (Appendix A).) The district court subsequently articulated the correct legal standards applicable to its decision and also set forth its reasons for imposing Thomas' sentence. (1/14/16 Tr., p.16, L.7 – p.24, L.13 (Appendix B).) The state submits that Thomas has failed to establish an abuse of discretion, for reasons more fully set forth in the attached excerpts of the sentencing hearing transcript, which the state adopts as its argument on appeal. (Appendices A and B.)

Conclusion

The state respectfully requests this Court to affirm Thomas' conviction and sentence.

DATED this 21st day of September, 2017.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

VICTORIA RUTLEDGE
Paralegal

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 21st day of September, 2017, served a true and correct copy of the attached RESPONDENT'S BRIEF by emailing an electronic copy to:

JASON C. PINTLER
DEPUTY STATE APPELLATE PUBLIC DEFENDER

at the following email address: briefs@sapd.state.id.us.

/s/ Lori A. Fleming
LORI A. FLEMING
Deputy Attorney General

APPENDIX A

APPENDIX B

1 rather than impose a retained jurisdiction.
2 THE COURT: Thank you, Mr. Souza. Mr. Pearson,
3 before I proceed to hear from Mr. Thomas, I assume from
4 your lack of advising the court regarding any victim
5 impact statement that they are not here today and do not
6 wish to make a statement; is that correct?
7 MR. PEARSON: Your Honor, I have not seen the
8 victim or her mother here today. As the court is well
9 aware, this matter has been continued several times, most
10 recently as last month. The victim was here. And her
11 mother was in the area and had to come up. However, that
12 matter was continued.
13 We have in the past been able to reach the
14 victim's mother via telephone and contact her and have had
15 regular contact with her over all of these proceedings.
16 She was always very good about contacting our office in
17 terms of when sentencing was. For instance, with the last
18 sentencing scheduled, prior to sentencing I spoke, or my
19 staff spoke to her, on three different occasions that
20 particular week.
21 The number that we have listed now we've been
22 unable to reach her at. It states it doesn't accept calls
23 from unknown numbers. You're not allowed to leave a
24 message. I know we've attempted to contact them in this
25 last week countless times. I have no idea how many times,

13

1 but hoping that even seeing a call from my office or maybe
2 that it would show the number and they would call back,
3 even though we're not able to leave a message, but
4 unfortunately we've been unsuccessful in contacting them.
5 So I think what we are left with is the victim statement
6 that is contained in the presentence investigation is all
7 we have. I have no other answer other than that.
8 THE COURT: That's fair. I appreciate that. One
9 other issue that I wanted to address is obviously an issue
10 that needs to be addressed by the court concerning the
11 current no contact order that's in place and whether or
12 not that will continue beyond today's sentencing. Have
13 you had any discussions with the family and the victim
14 concerning that issue?
15 MR. PEARSON: I've only met with the victim one
16 time while they were still here. Chief Deputy Hatch and
17 myself met with her while she was at school, the Preston
18 Junior High.
19 In regards to discussions with the mother, I
20 don't know that I've had that specific discussion
21 regarding the no contact order. We've talked many times
22 and I don't know if that specific issue was ever
23 discussed, Your Honor. Based on my read of the
24 presentence investigation, and the comments made therein,
25 I would assume that they would request that it remain in

14

1 I'm sorry. I spoke inappropriately. I can't change it,
2 but I can try. That's all I got.
3 THE COURT: Okay. Mr. Souza, at this time is there
4 any legal cause why the court should not pronounce
5 sentence in this matter?
6 MR. SOUZA: No, sir.
7 THE COURT: At the outset I'd like to advise Mr.
8 Thomas that I have closely reviewed the presentence
9 investigation report in this matter. I've considered the
10 attachments to that presentence investigation report,
11 specifically and most importantly in this particular
12 sentencing the psychosexual evaluation and the full
13 disclosure polygraph. I have given consideration to the
14 letters that have been attached as appendixes or documents
15 to the presentence investigation report. I've considered
16 the totality of the record that's been presented to me
17 here today.
18 I've also listened carefully to the sentencing
19 recommendations of both the state and the defense in this
20 matter, and considered Mr. Thomas's statement in
21 allocution.
22 I frequently say this, and unfortunately I say
23 this too often because there are too many cases of this
24 type in this courtroom for this court's comfort, but these
25 are the most difficult cases that I have to deal with. I

16

1 take them very seriously and I closely consider each of
2 the sentencing criteria, protection of society,
3 punishment, deterrence, and rehabilitation. I believe
4 strongly that each of these sentencing criteria have an
5 appropriate place in considering and fashioning and
6 creating a sentence for individuals who are convicted of
7 these types of crimes.

8 I want to be careful and clear, I do
9 understand that this crime that Mr. Thomas has been
10 charged with and convicted of, after a guilty plea in this
11 matter, is not the perpetration of any sexual act or
12 conduct on the person of the victim in this matter. The
13 question that has not been and is not answered, had this
14 young victim not had the strength, the independence, and
15 the back bone to say no to her father in this type of
16 circumstance, one might ask themselves would we be here on

17 [REDACTED]
18 [REDACTED]
19 young victim in this case had the strength and back bone
20 [REDACTED]
21 don't think that is something I should do.
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

17

1 [REDACTED] recognize that that has been disputed. I
2 recognize that there have been various different angles or
3 twists put on that, but I think at the end of the day, as
4 was noted by Mr. Pearson, and more particularly as
5 referred to by Mr. Pearson by Dr. Hatzenbuehler in the
6 psychosexual evaluation, that behavior was ultimately
7 admitted to and acknowledged by the defendant.

8 As I consider protection of society in light
9 of this crime, I have to be concerned. I recognize that I
10 hire Dr. Hatzenbuehler as an expert to evaluate Mr.
11 Thomas's sexual history, sexual deviancy and proclivities
12 that may arise from the psychosexual evaluation and the
13 full disclosure polygraph. It always is, and is in this
14 case, troubling to the court that not only did Mr. Thomas
15 fail one of the series of questions, but he failed them
16 all. And when I say failed, I mean that they were
17 deceitful and reactions were noted.

18 Those are of great concern to the court
19 because the court does require full disclosure polygraph
20 examinations. There are certain psychosexual evaluators
21 that have indicated to me in the past that they don't even
22 feel comfortable making an evaluation and making a
23 recommendation regarding risk of reoffense if there is not
24 a full accounting or reckoning. And one of those doctors
25 being Dr. Lindsay.

18

1 Dr. Hatzenbuehler does -- I think Dr.
2 Hatzenbuehler does a good job. I'm not questioning her
3 approach or her credentials. I just note that that is an
4 issue with individuals in the profession, that some feel
5 comfortable going forward with inconclusive or deceptive
6 results and others do not; Dr. Hatzenbuehler being one
7 that does.

8 It is always a red flag, and is always an
9 indicator to the court, that I don't have a full
10 accounting or a full reckoning by the defendant in this
11 matter regarding his sexual history, his sexual deviancy,
12 or proclivities that may be masked or may be not fully
13 accounted for in these matters. So from a protection of
14 society component that is a factor that the court always
15 has to think about and consider.

16 I also note that another thing that is
17 important and telling to the court in this analysis is a
18 statement on page two of the psychosexual evaluation
19 wherein I think Dr. Hatzenbuehler is attempting to explain
20 in part the low nature of the evaluation. She says, "Mr.
21 Thomas's risk level fell within a low risk range upon the
22 static factors. Empirical studies indicate that persons

23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

19

1 "Research indicates that reoffense rates also
2 decrease among persons older than 35 years of age." So
3 she notes those issues with respect to the static factors
4 in this case.

5 I frequently see this issue with respect to
6 sexual criminal charges that are brought within a family
7 context. There's a pattern that has developed in my
8 experience as a judge dealing with these cases. Quite
9 frequently they have an extremely low LSI, as is the case
10 in this particular situation. Quite frequently they have
11 a very minimal, if nonexistent, criminal history, as is
12 the case in this particular case.

13 Quite frequently those two issues are argued
14 by defense counsel and the parties that the court should
15 impose some type of sentence of probation or community
16 supervision based upon those two factors.

17 What the court has found, however, is in the
18 sex offender context that is pretty much the norm. The
19 individuals have some kind of sexual proclivity or
20 deviance that never surfaces until they are arrested on
21 one particular charge. They've been able to lead in all
22 other respects a relatively normal life. They haven't
23 violated criminal statutes, they haven't been in the
24 courts, they've maintained jobs. By all outward
25 appearances they are a good member of our communities and

20

1 society. But there's a hidden portion of those
2 individual's personalities and activities that keep them
3 from scoring high on LSI's, from having a criminal
4 history, but they have this deviant personality trait that
5 causes them to offend.
6 I'm not suggesting that Mr. Thomas is a
7 deviant sexual offender. What I am suggesting is the
8 diagnostic tools and procedures that we have to evaluate
9 those issues are inconclusive in this matter because of
10 the deceit and the issues that we have not been able to
11 have a full accounting and reckoning for. Coupled with
12 the fact that we do now have an admission of Mr. Thomas,
13 although it was not freely given, it was drawn out during
14 the course of the process, the guilty plea, subsequent
15 evaluations with a psychosexual evaluation and a full
16 disclosure polygraph, which does not, in this court's
17 mind, equate with being fully accountable and responsible
18 for one's conduct.
19 Those issues are all of concern to the court.
20 As I stated, as I consider protection of society, as I
21 consider punishment, deterrence, rehabilitation, I have to
22 give equal consideration to those factors as well as the
23 rehabilitative component in this matter and I've done so
24 in this particular case.
25

21

1 MR. SOUZA: Your Honor, a couple of matters. This
2 was not a public defender case.
3 THE COURT: I apologize. I will delete that \$800
4 reimbursement to the Sixth Judicial District Court fund
5 for the public defender. My oversight and my apologies on
6 that.
7 MR. SOUZA: And I think the report by Dr.
8 Hatzenbuehler confirms this, but we initiated the contact
9 with her to have the psychosexual evaluation done and the
10 defendant paid for that out of his own pocket.
11 THE COURT: Okay. I haven't assessed that cost
12 yet, but is that your understanding as well?
13 THE CLERK: Yes.
14 THE COURT: Okay. So there will be no assessment
15 for the cost of the psychosexual evaluation. Is that also
16 true with respect to the polygraph?
17 MR. SOUZA: Yes.
18 THE COURT: Okay. That will be the order of the
19 court at this time.
20 I will advise you, Mr. Thomas, that you have
21 42 days to file an appeal should you desire to file one.
22 If you can't afford the cost associated with an appeal,
23 you may petition the court for leave of court to file an
24 appeal in forma pauperis in this matter.
25 Mr. Thomas, I recognize your employment

23

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2
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6 Based upon all of these factors, based upon
7 the court's consideration of the sentencing criteria in
8 19-2521, the court will impose the following sentence in
9 this matter. I'll impose a unified six year sentence.
10 Two years will be fixed and four years will be
11 indeterminate.
12 I am going to retain jurisdiction over this
13 matter for a period of 365 days and order that the
14 defendant participate in the sex offender rider program.
15 I think the technical term for that it is the sex offender
16 assessment group offered through the Traditional Rider
17 program.
18 The court will impose a \$1600 fine. I'm going
19 to assess public defender expense in the amount of \$800
20 for partial reimbursement of the public defender. \$100
21 PSI to the Idaho Department of Corrections. \$100 for the
22 DNA and thumb print to the Idaho State Police.
23 I am going to order that the no contact order
24 remain in place at least until I see Mr. Thomas again at
25 the conclusion of his rider program in this matter.

22

1 issues. I hope that those are not jeopardized by this. I
2 hope they'll consider you back for employment when you
3 complete your rider program, and any other difficulties
4 that are inherent in this matter, but I do believe, as I
5 consider protection of society, punishment, deterrence and
6 rehabilitation, you'll get a head start on your sex
7 offender treatment in this matter on the rider and that
8 this is necessitated by the facts and circumstances of
9 this case.
10 That will be the order of the court at this
11 time. I will remand Mr. Thomas to the custody of the
12 Franklin County sheriff's department to commence serving
13 his sentence in this matter.
14 Any questions from the state at this time?
15 MR. PEARSON: No, Your Honor.
16 THE COURT: Anything from the defense, Mr. Souza?
17 MR. SOUZA: Not at this time, Your Honor.
18 THE COURT: All right. Thank you.
19 (Hearing concluded.)
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